Amusu Properties Sdn Bhd v Muruchadayah s/o AMS Pillay

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-205-1988
PEH SWEE CHIN J
12 JANUARY 1989

Contract – Accord and satisfaction – Caveat lodged by caveator beneficially entitled to lands – Subsequent agreement to withdraw caveat and transfer lands to company on promise of cash payment and issuance of company's shares to caveator – Whether accord and satisfaction barred claim of caveator to lands

Land Law – Caveat lodged by caveator beneficially entitled to lands – Subsequent agreement to withdraw caveat and transfer lands to company on promise of cash payment and issuance of company's share to caveator – Accord and satisfaction – Whether caveator still had caveatable interest in land

In this case, Amusu Properties Sdn Bhd ('the company') applied to the court for the removal of a caveat lodged by the caveator in respect of twelve pieces of land ('the said lands') presently registered in the name of P. P, Y and the caveator were three brothers who formed the company, and under a family agreement, the caveator (who was beneficially entitled under a trust affecting the said lands) agreed to withdraw a previous caveat lodged against the said lands on the promise of the issue of shares representing one-seventh of the company's equity to the caveator and also on the further promise of payment of a sum of $250,000 by the company to the caveator. Clause 1(2) in the family agreement stated that the caveator shall not enter any other private caveats against the said lands unless P defaulted in his obligations under the agreement. It was agreed by all parties at the hearing of the present application that the obligations in cl 1(2) referred only to the obligations to pay the sum of $250,000 and to issue shares in the company to the caveator as described. On the same date of the family agreement, the company, the caveator and Y entered into a tripartite agreement whereby, inter alia, both the caveator and Y, in consideration of the company undertaking to pay the sum of $250,000 to each of them, confirmed in cl 4 that 'they have no further claim against Amusu in respect of, and no caveatable interest in, the said titles'. The previous caveat was subsequently withdrawn but a fresh one, ie the one in dispute, was lodged after some dispute. The main issues before the court were how far cl 1(2) of the family agreement could go in the face of cl 4 of the tripartite agreement and whether the caveator had any caveatable interest for the caveat to be lodged. Counsel opposing the caveator submitted that once the tripartite agreement was signed, any right which the caveator might have over the lands was extinguished and that the caveator only had a money claim.

Held, allowing the application:

(1) The fact that cl 1(2) of the family agreement allowed the caveator to lodge a fresh caveat when the obligations to pay $250,000 and to issue shares in question in the company to the caveator were not carried out could not preclude other parties from impugning the caveat in dispute. The viability of the caveat did not depend on prior consent of P and Y but on its own strength, ie the caveat lodged would have to be based only on a caveatable interest that the caveator had.

(2) A contracting party in respect of his obligation towards another is released from such obligation if there is accord and satisfaction between the two parties. The satisfaction need not be executed and it could be executory.

(3) Before the family agreement and tripartite agreement were signed, there was no doubt that the caveator had a valid claim to be beneficially entitled under a trust affecting the said lands. The caveator had therefore a caveatable interest under s 323 of the National Land Code 1965 in respect of the said lands. However, under the family agreement and the tripartite agreement, the lands were to be transferred to the company which would issue the shares and pay also the sum of $250,000. The original obligation, with regard to the principle of accord and satisfaction, was the obligation of the trustees to distribute the residue to the caveator. The substituted obligation was the issue of shares and the payment of $250,000.

(4) Since the family agreement and tripartite agreement was signed, and on their true construction, the caveator had agreed to accept the promise of payment of $250,000 there was an accord and satisfaction whereby the executor's old obligation was substituted with the new. Such accord and satisfaction would therefore bar any claim of the caveator to the lands as a beneficiary other than the sum of $250,000. Their claim could not amount to any caveatable interest as defined in the National Land Code 1965.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 446 of 1988.]

Cases referred to

1 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (refd)
2 *British Russian Gazette & Trade Outlook Ltd* v *Associated Newspapers Ltd* [1933] 2 KB 616 (refd)
3 *Hirachand Punamchand* v *Temple* [1911] 2 KB 330 (refd)

R Jegatheesa for the applicant.
LH Singh for the first respondent.
G Moganasundram for the second respondent.

Cur Adv Vult

Peh Swee Chin J: The facts of this case gave rise to an application of the principle of accord and satisfaction in the discharge of an obligation.

It was an application for removal of a caveat from Amusu Properties Sdn Bhd (hereinafter called 'the company'), the caveat having been lodged by one Marugiah (hereinafter called 'the caveator') in respect of twelve pieces of land (hereinafter called 'the said lands') presently registered in the name of one Periasamy (hereinafter called 'the executor'), holding the same as personal representative of the estate of one Suppiah, deceased, (hereinafter called 'the deceased').

The company was formed by three brothers, viz the executor, the caveator and one Yegambaram (hereinafter called 'Yega'), all children of the deceased, who was a man of great wealth.

Grant of probate of the estate of the deceased was issued to the executor and the said lands had formed part of the extensive assets of the deceased.

The facts of this case are somewhat complicated, with a series of documents having been executed, but for the purpose of this case, I would have to attempt to separate the chaff from the grain in stating briefly the relevant facts.

Differences must have arisen among the three brothers concerning the assets of the deceased so that they thought it expedient to enter into an agreement for a comprehensive settlement of the differences (the agreement is hereinafter called 'the family agreement'). Among many provisions was one that concerned the said lands. The family agreement apparently gave birth to the company, formed, inter alia, to do business, of housing development, at any rate at this stage of the company's history.

It appeared that, inter alia, the caveator had lodged a previous caveat against the said lands.

Under the family agreement, briefly, the caveator agreed to withdraw the said previous caveat on the promise of the issue of shares representing one-seventh of the equity of the company to the caveator and also on the further promise of payment of a sum of $250,000 by the company to the caveator.

On the same date of the family agreement, the company, the caveator and Yega entered into another agreement arising out of the family agreement and the previous caveat whereby not only the caveator, but Yega also, agreed to withdraw their respective claims to the said lands, and the caveator, in addition, agreed further to withdraw the said previous caveat with the company agreeing to pay to each of them $250,000 each. It was agreed that each of the sum of $250,000 had to be paid on or before 36 months from 14 December 1984.

I pause here to observe that this tripartite agreement did not detract in any way from the obligations to pay $250,000 and to issue shares representing one-seventh of the equity of the company, which obligations the company had not at any time denied. Shortly after the filing of the present summons, share certificates of the number of shares in question were despatched to the caveator's solicitors who returned the same to the company for fear of prejudicing their claim to the continuance of the caveat in question.

The last clause, ie cl 4 of the tripartite agreement, was significant, for by the clause, both the caveator and Yega in consideration of the undertaking to pay the said sum of $250,000 to each of them, they, to quote: 'hereby confirm that they have no further claim against Amusu in respect of, and no caveatable interest in the said titles.' The said titles refer to the said lands and 'Amusu' refers to the company herein. This cl 4 was heavily relied on by learned counsel for the company and the executor.

Completely inconsistent with this clause was another clause in the family agreement which formed the pivotal argument of learned counsel for the caveator, it being cl 1(2) of the family agreement in the following words:

> 1(2) AMSM shall not enter any other private caveats against the said twelve properties unless AMSP shall be in default of all his obligations under this agreement.

'AMSM' refers to the caveator, 'AMSP' to the executor and 'twelve properties' to the said lands.

I pause to observe that the obligations referred to in cl 1(2) quoted above were treated by all parties and counsel before me seemingly as having particular reference only to the obligations to pay the sum of $250,000 and to issue shares in the company to the caveator as described above. The court would have to go along with all the parties and their counsel in reminding itself that the area demarcated by them was that that required adjudication.

I pause to observe further that the previous caveat was actually withdrawn and a fresh one, ie the one in dispute, was lodged on the same ground of the caveator being a beneficiary to the deceased's estate, a fall-back position, as expressly permitted by the other two brothers in the family agreement, viz Yega and the executor. The court therefore did not feel it was entitled to go into the question of sustainability of a fresh caveat after the withdrawal of the previous one on the same ground. The question did not crop up in affidavits nor was it even mentioned in counsel's submissions.

There was no doubt that the onus lay on the caveator to satisfy the court that there was a serious question to be tried as to the caveator's claim to any title to or any registrable interest in the said lands or any right to such title or interest (please see s 323(1)(a) of the National Land Code), or a claim to be beneficially entitled under any trust affecting any such land or interest (please see s 323(1)(b) of the same Code). Such onus, in general, has been explained with exceptional clarity by Lord Diplock in *Eng Mee Yong's* case.[1] It would be only after the court was so satisfied of such serious question for trial that the court would move to the next and final question of balance of convenience.

A number of issues were canvassed and the final question would be as to how far cl 1(2) of the family agreement could go in the face of the other relevant circumstances, including the tripartite agreement, and cl 4 of such tripartite agreement.

In my view, the fact that cl 1(2) of the family agreement allowed the caveator to lodge a fresh caveat when the obligations to pay $250,000 and to issue the shares in question in the company to the caveator were not carried out, could not preclude other parties from impugning the caveat in dispute. The viability of the caveat did not

depend on prior consent of the other brothers should this question come before the court. In the event that had turned out before the court, the other two brothers declared themselves not bound by it; the caveat had to depend on its own strength as to whether it ought to be allowed to continue, ie the caveat thus lodged would have to be based only on the caveatable interest that the caveator had.

To find an answer to the question as to whether the caveator had any caveatable interest for the caveat which he lodged, I would have to digress from it for the moment and look at the material facts.

Learned counsel opposing the caveator submitted that once the tripartite agreement was signed, any right which the caveator might have over the said lands was extinguished, and that the caveator only had a money claim, because, counsel further submitted that the caveator had agreed to claim money and not an interest in the said lands.

Inter alia, the sum of $250,000 had not been paid up to the date of judgment because it was submitted by learned counsel for the company that the company could not effectively sell twelve three-storey buildings standing on the said lands partly on account of the caveat in question. The company admitted to financial difficulty.

Inter alia, the caveator had, before the filing of the present summons, already filed a civil suit in Ipoh High Court (CS 23-76-88) for the recovery of $250,000.

Share certificates in respect of the promised shares were sent later to the caveator and though returned, they were presumably ready for collection, if desired.

I made an order in terms of the application of the company claiming, inter alia, the removal of the caveat in question. In giving my grounds for my decision, I would continue to deal with the caveat in dispute which was the bone of contention before me.

To give reasons for my judgment, as a matter of having a more convenient sequence, I will set out what appeared to me to be the correct principles in the light of which my reasons could be understood.

A contracting party in respect of his obligation towards another is released from such obligation if there is accord and satisfaction between the two parties. 'An accord and satisfaction', according to that great judge from the early part of this century, ie Lord Justice Scrutton, in *British Russian Gazette & Trade Outlook Ltd* v *Associated Newspapers Ltd*[2] at p 643, 'is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the agreement is discharged. The satisfaction is the consideration which makes the agreement operative.'

In my view, the valuable consideration referred to in the above passage refers to some substituted obligation in place of the original obligation. Without satisfaction, that is, the substituted obligation, mere accord would not bar an action based on the original obligation. The simplest form of such substituted obligation is usually the payment of money, in satisfaction of the original obligation.

The facts of the *British Russian Gazette*[2] can be briefly stated as follows. One Talbot founded the plaintiff company publishing the newspaper called *British Russian Gazette & Trade Outlook* edited by his secretary, one Miss Parker. There was a change of editorial policy later, the latter policy being to conciliate the Russian government and promote trade with the Russians, with the plaintiff company thereby becoming very friendly with the Russians. In the period before the Second World War, the mood of the British people was largely anti-Russian, and the *Daily Mail*, owned by the defendant, published a rather uncomplimentary article about the Russians, touching at the same time on the plaintiff and Talbot.

Both the plaintiff company and Talbot sued the defendant for libel, and by that time, Miss Parker owned more shares in the plaintiff company than Talbot did.

Negotiations were carried on between Talbot and the defendant's representatives and in the course of which Talbot purportedly, on behalf of the plaintiff company, also wrote a letter to the defendant as follows, 'I accept the sum of one thousand guineas ... in full discharge and settlement of my claims ... and I will instruct my solicitors to serve notice of discontinuance ...'.

The plaintiff company declined to be bound by the letter. At that time, the majority shareholder, Miss Parker, who was also the managing director, had not been consulted previously about the settlement and she decided that the plaintiff company should proceed further with the action. The defendant then amended its statement of defence by including a counterclaim against Talbot for damages for breach of warranty of authority.

Talbot argued in court that the letter was not enforceable because there was no satisfaction for the agreement (accord) to settle as the satisfaction was not yet executed but was merely executory. The Court of Appeal unanimously rejected this argument and held that the said letter constituted a promise to pay the said 1,000 guineas. The case also settled the position that the substituted obligation or promise or the satisfaction need not be executed, and that it could be executory. Scrutton LJ, in delivering the judgment, uttered the words quoted above.

It goes without saying that it is a question for the court to find on any document, or evidence whether it is the performance of the substituted obligation that is intended by the parties as such satisfaction, or on the other hand, just a mere promise to perform it as so intended by the parties.

Looking at the family agreement and the tripartite agreement, I had no doubt that the caveator had accepted a promise to have the sum of $250,000 paid to him instead of the actual payment. I was fortified in my view, in particular by the facts of actual withdrawal of the previous caveat before the caveator had received even one cent, secondly, of the filing of the civil suit for the recovery of $250,000 before the present summons was filed.

Before the family agreement and tripartite agreement were signed, there was no doubt that the caveator had a valid claim to be beneficially entitled under a trust affecting the said lands. To be more specific, the executor would at any rate assume the additional capacity of a trustee when he had fully administered the estate of the deceased and held the residue. The caveator had as against the said lands, therefore a caveatable interest under s 323 of the National Land Code in respect of the said lands that formed part of the estate of the deceased. Under the family agreement and the tripartite agreement, the said lands were to be transferred to the company which would issue the shares mentioned earlier and pay also the sum of $250,000.

The original obligation in this case, with regard to the principle of accord and satisfaction, was the obligation of the trustee, in respect of the said lands, to distribute the residue, or rather one-third of it to the caveator.

The substituted obligation was the issue of shares and the payment of $250,000.

It would make no difference that the substituted obligation was to be performed by the company, and not by the executor for satisfaction could come from a third party. Thus in *Hirachand Punamchand* v *Temple*,[3] a father sent to his son's creditor a bank draft, in fact for a sum less than the debt. It was cashed by the creditor. It was held that the creditor could not maintain an action for the balance as it would be a fraud to do so. It was implicit in that judgment that such satisfaction could come from a third party. It, of course, happens all the time that an insurance company pays the sum agreed by both plaintiff and defendant in any running-down case.

Since the family agreement and tripartite agreement were signed, and on their true construction, the caveator had agreed to accept the promise of payment of $250,000 there was an accord and satisfaction, whereby the executor's old obligation was substituted with the new. A new cause of action was created in regard to the sum of $250,000 which irreversibly he had to accept. Such accord and satisfaction would therefore bar any claim of the caveator to the said lands as a beneficiary other than the sum of $250,000.

If this remedy now was merely to claim $250,000, this claim could not amount to any caveatable interest as defined in the National Land Code. The substratum which used to support the previous caveat had disappeared forever.

Should it be said elsewhere that the issue of accord and satisfaction was never pleaded, I would revert to the submission of counsel for the executor set out earlier, which though slightly peripheral and not pronouncedly direct, was, in my view broad enough to attract the operation of the principle as explained in the *British Russian Gazette* case.[2]

I therefore ordered the removal of the caveat to allow the transfer of the said lands asked for in the summons. I further ordered that costs payable to the successful parties (the applicants and the second respondent) be paid out of the fund of the estate of the said deceased. There was no other order as to costs.

Application allowed.

Solicitors: *RJ Esa & Co*; *LH Singh & Co*; *Mogan & Co.*

Reported by *Ng Sheau Jiuan*

Lim Eng Yew v United Oriental Assurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO P395 OF 1980
AJAIB SINGH J
13 JANUARY 1989

Road Traffic – Motor insurance – Policy covered vehicle owner and authorized driver – Plaintiff in the employ of vehicle owner – Plaintiff injured while travelling as passenger in vehicle owner's lorry – Authorized driver sued – Whether defendant insurance company liable to pay damages – Road Traffic Ordinance 1958, s 80(1)

Insurance – Motor insurance – Policy covered vehicle owner and authorized driver – Plaintiff in the employ of vehicle owner – Plaintiff injured while travelling as passenger in vehicle owner's lorry – Authorized driver sued – Whether defendant insurance company liable to pay damages – Road Traffic Ordinance 1958, s 80(1)

The plaintiff sued the defendants pursuant to s 80(1) of the Road Traffic Ordinance 1958 as a result of injuries suffered in a motor accident caused by the negligence of the driver of the motor lorry in which he was travelling. At the time of the